

Minnesota Sentencing Guidelines Commission
Approved Meeting Minutes
February 21, 2013

The Minnesota Sentencing Guidelines Commission (MSGC) meeting was held on February 21, 2013, in the Pung Conference Room at the Department of Corrections (DOC), 1450 Energy Park Drive, St. Paul, Minnesota. Commission members present were Chair Jeff Edblad, Jason Anderson, Hon. Christopher Dietzen, Sgt. Paul Ford, Connie Larson, Hon. Carrie Lennon, DOC Commissioner Tom Roy, John Stuart, and Yamy Vang. MSGC staff members present were Executive Director Kelly Mitchell, Jackie Braun, Jill Payne, and Anne Wall. Also present were Jim Early from the Attorney General's Office, Scot Umlauf from Minnesota Narcotics Investigators, and Bill Lemons from the Minnesota County Attorneys Association.

1. Call to Order.

The meeting was called to order at 2:00 p.m.

2. Approval of Meeting Minutes from December 20, 2012.

Motion to approve minutes was made by Jason Anderson and seconded by Hon. Carrie Lennon.

Motion carried.

3. Questions Answered from November 2012 Meeting Presentation (follow-up presentation)

Anne Wall presented additional data concerning departures based upon questions from Commission members at the November meeting following a data presentation about offenses with high departure rates.

Anne first presented information describing departure rates in Minnesota compared to other guidelines states. Sentencing guidelines vary greatly between states, but Washington, Kansas, and Oregon are fairly comparable to Minnesota in how their sentencing guidelines are applied. Minnesota has an overall departure rate of 27% compared to 28% in Oregon, 16% in Washington, and 18% in Kansas. However, each state varies greatly in alternative sentencing options available such as border-boxes and first time offender sentencing which makes meaningful comparisons between states very difficult. Commission members expressed interest in hearing more on how Minnesota's departure rates in high level drug offenses compare to other states with respect to both the presumptive sentence and the statutory definition.

Next, departure rates were compared across judicial districts for offenses that are presumptive commitments with statewide departure rates at or above 55%: second-degree assault (assault with a weapon), first-degree aggravated robbery, first- and second-degree controlled substance offenses, felon in possession of a firearm, and failure to register as a predatory offender. Anne demonstrated that departure rates for each offense vary greatly by judicial district. A member noted that high dispositional departure rates in specific districts may be due to the availability of local correctional programs.

In summary, for these offenses combined, the overall dispositional departure rate was 43%; the durational departure rate was 18% and 39% of offenders received the presumptive sentence. The 3rd District had the lowest overall departure rate at 37% and the 4th District had the highest overall departure rate at 71%. The 10th District had the highest dispositional departure rate at 55% followed by the 6th District at 50%. The 2nd and 3rd Districts had the lowest dispositional departure rates at 31% and 33% respectively. The 4th District had the highest durational departure rate at 28% and the 3rd District had the lowest durational departure rate at 4%.

Next Anne Wall presented follow-up information on departures for first- and second-degree controlled substance offenses. These offenses both have a presumptive disposition of commitment. For those who are sentenced to prison but receive a durational departure, the average reduction in months was 42.4 months for first-degree offenses and 27.9 months for second-degree offenses. A Commission member asked how much of a percentage reduction from the presumptive sentence that represents. Staff will bring this information to a future meeting. For those who receive dispositional departures, the average duration of conditional confinement was 251 days for first-degree and 218 days for second-degree. The average pronounced probation time for first-degree offenses was 18.3 years, and ranged from a low of 5 years in the 4th District to a high of 30.3 years in the 7th District. The average pronounced probation time for second-degree offenses was 15.0 years, and ranged from a low of 3.7 years in the 4th District to a high of 23.6 years in the 7th District. Members noted that the probation durations varied greatly, though after 5 years offenders generally have either been successful or have had their sentence revoked. Anne Wall confirmed that the majority of probation revocations occur within two years of sentencing. Probation terms vary in duration pronounced and also at what point probation agents typically seek early release from probation from the court. Members noted that long probation terms affect caseloads and the resources available at the local corrections level. Of those sentenced to probation, 14.2% of first-degree offenders and 14.5% of second-degree offenders were revoked to prison. These revocation rates are lower than the rates for other drug offenses and are also lower than the overall average revocation rate for all offenses. A member asked whether the Commission could look into probation success based on the probation system used. Another member noted that evaluating probation systems may not be within the purview

of the Commission. Finally, Anne reported that most first- and second-degree drug offenders have no criminal history (43%). Of those that do have criminal history, 44% have a prior drug offense, 20% have a prior property offense, and 13% have a prior person offense. A member asked whether offenders with a prior drug offense were less successful than offenders without a prior drug offense. Staff will be presenting outcome information at a future meeting, and said they would look at it from this perspective.

4. Technical Modifications to the Guidelines

a. Renumbering Theft Offenses

i. Theft of Motor Fuel from Retailer Minn. Stat. §609.52

The Legislature added a new felony theft-related offense which is currently unranked. Section 7 of the Guidelines includes the Commission's policy for theft –related offenses.

Motion to rank theft of motor fuel at Severity Level 2 for theft under \$5,000 and Severity Level 3 for theft over \$5,000 in accordance to the monetary values in Section 7 of the Guidelines was made by Commissioner Tom Roy and seconded by Sgt. Paul Ford (shown below).

Motion carried.

5.A. OFFENSE SEVERITY REFERENCE TABLE

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SEVERITY LEVEL	OFFENSE	STATUTE
3	Theft Crimes – Over \$5,000	<i>See section 7: Theft Offense List</i>
2	Theft Crimes - \$5,000, or Less	<i>See section 7: Theft Offense List</i>

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5.B. SEVERITY LEVEL BY STATUTORY CITATION

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Statute Number	Offense Title	Severity Level
<u>609.52 subd. 2(a)(18)</u>	<u>Theft of Motor Fuel from Retailer (Over \$5,000)</u>	<u>3</u>
<u>609.52 subd. 2(a)(18)</u>	<u>Theft of Motor Fuel from Retailer (\$5,000 or Less)</u>	<u>2</u>

ii. Theft Recodified

To accommodate the new theft of motor fuel from retailer offense, the theft statute was recodified to include paragraph (a) after subdivision 2. The Guidelines references do not currently include paragraph (a) after the subdivision.

Motion to add (a) after subdivision 2 in the affected sections was made by Jason Anderson and seconded by Hon. Carrie Lennon (shown below).

Motion carried.

5.A. OFFENSE SEVERITY REFERENCE TABLE

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SEVERITY LEVEL	OFFENSE	STATUTE
6	Theft Over \$35,000	609.52, subd. 2(<u>a</u>)(3),(4), (15), & (16) with 609.52, subd. 3(1)
4	Theft of Motor Vehicle	609.52, subd. 2(<u>a</u>)(1)
3	Motor Vehicle Use Without Consent	609.52, subd. 2(<u>a</u>)(17)
3	Theft of Trade Secret	609.52, subd. 2(<u>a</u>)(8)

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5.B. SEVERITY LEVEL BY STATUTORY CITATION

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Statute Number	Offense Title	Severity Level
609.52 subd. 2(a)(1)	Theft (Over \$5,000)	3
609.52 subd. 2(a)(1)	Theft (\$5,000 or Less)	2
609.52 subd. 2(a)(1)	Theft of a Motor Vehicle	4**
609.52 subd. 2(a)(2)	Taking Pledged Property (Over \$5,000)	3
609.52 subd. 2(a)(2)	Taking Pledged Property (\$5,000 or Less)	2
609.52 subd. 2(a)(3) with subd. 3(1)	Theft by Check/False Representation (Over \$35,000)	6
609.52 subd. 2(a)(3)(i)	Theft by Check (\$5,001 - \$35,000)	3
609.52 subd. 2(a)(3)(i)	Theft by Check (\$5,000 or Less)	2
609.52 subd. 2(a)(3)(ii-v)	Theft by False Representation (\$5,001-\$35,000)	3
609.52 subd. 2(a)(3)(ii-v)	Theft by False Representation (\$5,000 or Less)	2
609.52 subd. 2(a)(4) with subd. 3(1)	Theft by Trick (Over \$35,000)	6
609.52 subd. 2(a)(4)	Theft by Trick (\$5,001-\$35,000)	3
609.52 subd. 2(a)(4)	Theft by Trick (\$5,000 or Less)	2
609.52 subd. 2(a)(5)	Temporary Theft (Over \$5,000)	3
609.52 subd. 2(a)(5)	Temporary Theft (\$5,000 or Less)	2
609.52 subd. 2(a)(6)	Refusing to Return Lost Property (Over \$5,000)	3
609.52 subd. 2(a)(6)	Refusing to Return Lost Property (\$5,000 or Less)	2

** See *Comment 2.A.05* for commentary on motor vehicle offense severity levels.

Statute Number	Offense Title	Severity Level
609.52 subd. 2(a)(7)	Theft from Coin Operated Machine (Over \$5,000)	3
609.52 subd. 2(a)(7)	Theft from Coin Operated Machine (\$5,000 or Less)	2
609.52 subd. 2(a)(8)	Theft of Trade Secret	3
609.52 subd. 2(a)(9)	Theft of Leased Property (Over \$5,000)	3
609.52 subd. 2(a)(9)	Theft of Leased Property (\$5,000 or Less)	2
609.52 subd. 2(a)(10)&(11)	Altering Serial Number (Over \$5,000)	3
609.52 subd. 2(a)(10)&(11)	Altering Serial Number (\$5,000 or Less)	2
609.52 subd. 2(a)(12)	Theft of Cable TV Services (Over \$5,000)	3
609.52 subd. 2(a)(12)	Theft of Cable TV Services (\$5,000 or Less)	2
609.52 subd. 2(a)(12)	Theft of Services (Over \$5,000)	3
609.52 subd. 2(a)(13)	Theft of Services (\$5,000 or Less)	2
609.52 subd. 2(a)(14)	Theft of Telecommunication Services (Over \$5,000)	3
609.52 subd. 2(a)(14)	Theft of Telecommunication Services (\$5,000 or Less)	2
609.52 subd. 2(a)(15)(16) with subd. 3(1)	Diversion of Corporate Property (Over \$35,000)	6
609.52 subd. 2(a)(15)(16)	Diversion of Corporate Property (\$5,001 - \$35,000)	3

Statute Number	Offense Title	Severity Level
609.52 subd. 2(<u>a</u>)(15)(16)	Diversion of Corporate Property (\$5,000, or Less)	2
609.52 subd. 2(<u>a</u>)(17) *	Motor Vehicle Use Without Consent	3**

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7. Theft Offense List

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Statute Number	Offense Title
609.52 subd. 2(<u>a</u>)(1)	Theft
609.52 subd. 2(<u>a</u>)(2)	Taking Pledged Property
609.52 subd. 2(<u>a</u>)(3)(i)	Theft By Check
609.52 subd. 2(<u>a</u>)(3) (ii), (iii), (iv), & (v)	Theft By False Representation
609.52 subd. 2(<u>a</u>)(4)	Theft by Trick
609.52 subd. 2(<u>a</u>)(5)	Temporary Theft
609.52 subd. 2(<u>a</u>)(6)	Refusing to Return Lost Property
609.52 subd. 2(<u>a</u>)(7)	Theft from Coin Operated Machines
609.52 subd. 2(<u>a</u>)(9)	Theft of Leased Property
609.52 subd. 2(<u>a</u>)(10) & (11)	Altering Serial Number
609.52 subd. 2(<u>a</u>)(12)	Theft of Cable TV Services
609.52 subd. 2(<u>a</u>)(13)	Theft of Services
609.52 subd. 2(<u>a</u>)(14)	Theft of Telecommunications Services

* Includes offenses sentenced according to Minn. Stat. § 609.52, subd. 3(3)(d).

** See *Comment 2.A.05* for commentary on motor vehicle offense severity levels.

609.52 subd. 2(a)(15) & (16)	Diversion of Corporate Property
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b. Changes to Appendix 1 and 2

Three offenses listed in the appendices refer to the incorrect location for the source of the mandatory minimum or presumptive sentence. The current title of Appendix 1 indicates that all of the presumptive sentences are mandatory minimums when some are due to Guidelines policy, and are presumptive sentences rather than mandatory sentences.

Motion was made by Hon. Carrie Lennon and seconded by Yamy Vang to modify the Guidelines as shown below.

Motion carried.

Appendix 1. Mandatory and Presumptive Sentences Reference Table

This table is for convenience when applying mandatory sentences (section 2.E) and presumptive sentences (section 2.C). It is not exhaustive.

* * *

Statute	Offense	Prerequisite or Conditions	Minimum Duration
<u>152.023, subd. 3(a)</u>	<u>Controlled Substance Crime 3rd Degree</u>	<u>Prior felony conviction per chapter Minn. Stat. § 152 or finding under Minn. Stat. § 152.18</u>	<u>Grid Time¹</u>
152.023, <u>subd. 3(b)</u>	Controlled Substance Crime 3rd Degree	Prior felony conviction per chapter Minn. Stat. § 152 or finding under Minn. Stat. § 152.18	24 months
609.582, subd. 1(a)	Burglary 1st Degree	Prior felony burglary	Grid Time ¹

¹ Presumptive commitment per Guidelines section 2.C.

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Appendix 2. Dangerous Weapons Offense Reference Table

This table is for convenience when applying mandatory sentences (section 2.E) and presumptive sentences (section 2.C.) It is not exhaustive.

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Dangerous Weapons – Minn.Stat. § 609.11			
Statute	Offense	Prerequisite or Conditions	Minimum Duration
609.165 or 624.713.1(2) <u>609.11, subd. 5(b)</u>	Certain Persons not to have Firearms	<u>Current conviction under 609.165 or 624.713 subd. 1(2)</u>	60 Months

5. Expungement and Guidelines Criminal History

The Commission received a letter from Richard Hodsdon from the Washington County Attorney's Office requesting clarification of whether expunged offenses are eligible for use in future criminal history. Currently, the Guidelines do not address this issue. Minn. Stat. § 609A.03 states that an ex parte order may open expunged records for sentencing. Commission members agreed that the statute is clear on the process required for including an expunged offense in criminal history. A member noted that probation agents would be unlikely to be aware of this process. A member recommended referencing the expungement statute in the Guidelines to direct practitioners to the governing statute.

Motion was made by Commissioner Tom Roy and seconded by Sgt. Paul Ford for staff to prepare language to include in the comments of the criminal history section of the Guidelines and have legal staff review the language.

A member expressed concern that there may be confusion between statutory expungement and sealing. The Attorney General's office will assist in drafting language that is consistent with the differing effects of statutory expungement, inherent authority expungement, and sealing.

Motion carried.

6. Mandatory Minimum for Subsequent Sex Offenders

Jill Payne explained that some subsequent sex offenses are not presumptive commitments per the Guidelines or by statute. It appears that the Legislature repealed the mandatory minimum for subsequent sex offenses inadvertently in 2006. At the time of the creation of the Sex Offender Grid, the Commission had assumed that the mandatory minimum would be in place and that all subsequent sex offenders would receive a presumptive prison sentence. According to MSGC Monitoring Data, there were 9 subsequent sex offenders sentenced between 2009 and 2011, who were not recommended prison under the Guidelines, but who would have been subject to the mandatory minimum if it were not repealed. In one case, the offender was sentenced to prison through an aggravated dispositional departure. The remaining 8 offenders had presumptive stayed dispositions. Legislative bills that would reinstate the mandatory minimum have been introduced since the repeal, most recently in 2011.

The Commission discussed adding policy to the Guidelines similar to subsequent first-degree burglary that would create a presumptive commitment sentence for subsequent sex offenders regardless of where they fall on the Grid. A Commission member asked for information on whether the offenders who received probation were successful. It was noted that judges would still be able to depart and sentence subsequent sex offenders to probation if a mandatory minimum was in place or if the presumptive disposition was commitment per the Guidelines. Kelly Mitchell noted that staff can determine what the departure rate was for these offenses before the mandatory minimum was repealed. A member noted that not all of the offenses have the same level of severity because some are involving children under 13 whereas others involve adults. Members requested additional information on how the Commission has added policy in the past to make subsequent offenses presumptive commitments. A member noted that the original intent of the Guidelines was for offenders who commit person offenses to receive prison sentences, and that the current sentencing policy may not be in tune with this original intent. The Commission agreed to bring the issue to the attention of the Legislature in the form of a letter and recommend reinstating the mandatory minimum.

7. Other Business

Kelly Mitchell noted that Commission staff has completed several fiscal notes requests and expect more to come. It is likely that there will be several new offenses to rank at the end of the Legislative session.

A member mentioned that during a recent panel at William Mitchell Law School, it was noted by prominent members of the corrections community that drug offenses and penalties in Minnesota should be revisited.

8. Public Input

There was no additional input from the public.

9. Adjournment

Motion for adjournment was made by Hon. Christopher Dietzen and seconded by Connie Larson.

Motion carried.

Chair Edblad adjourned the meeting at 4:00 p.m.